IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 62923-9-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JOSEPH NATHAN McCLAIN,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: March 8, 2010
	)	
	)	

Cox, J. — An appellant seeking review under RAP 2.5(a)(3) must demonstrate that the claimed error is "manifest" and truly of constitutional dimension.[1] Here, a detective's isolated reference to the fact that Joseph McClain requested an attorney during post-arrest questioning was not a manifest error. Nor can McClain show that he was prejudiced by the State's allegedly improper statements during closing argument. The trial court did not err with respect to its imposition of a $100 DNA collection fee. Finally, remand is unnecessary because the trial court entered its written findings and conclusions under CrR 3.5(c) after McClain filed his opening brief pointing to that error. He has not challenged those findings and conclusions. We affirm.

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[1] State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

In the early morning hours of February 21, 2005, Joseph McClain went to John Howie's Federal Way apartment armed with a handgun. Charles David and Timothy Swenson were at the apartment with Howie. Howie let McClain into the apartment.

McClain told Swenson to lie face down on the ground. McClain eventually shot both Swenson and David. McClain also shot four times through the door of the bathroom where Howie had fled and locked the door.

Swenson died at the scene. A bullet went through David's arm and cheek, shattering his jaw.

McClain fled and was taken into custody after a high-speed police pursuit.

The State charged McClain with one count of murder in the first degree and two counts of attempted murder in the first degree. Before trial, the court granted McClain's motion to consolidate these charges with an unrelated charge for violation of the Uniform Controlled Substances Act. McClain's defense at trial was that he was incapable of forming the intent to commit murder and to control his conduct because his mental capacity was diminished due to his drug use.

A jury convicted McClain as charged.

McClain appeals.

REQUEST FOR COUNSEL

McClain argues that the State committed manifest constitutional error by eliciting testimony from a detective during its case-in-chief that McClain requested to have counsel present during post-arrest questioning. We disagree.

McClain claims the right to raise the error for the first time on appeal based on RAP 2.5(a)(3). "The general rule is that appellate courts will not consider issues raised for the first time on appeal."[2] Under RAP 2.5(a)(3), a claim of error may be raised for the first time on appeal, however, if it is a manifest error affecting a constitutional right.[3]

An appellant seeking review under RAP 2.5(a)(3) must demonstrate that the error is "manifest" and truly of constitutional dimension.[4] "Stated another way, the appellant must 'identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial."[5] If a court determines the claim raises a manifest constitutional error, it may still be subject to harmless error analysis.[6]

"In analyzing the asserted constitutional interest, we do not assume the alleged error is of constitutional magnitude."[7] We look to the asserted claim and

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[2] Kirkman, 159 Wn.2d at 926 (citing RAP 2.5(a)).

[3] Id.

[4] Id.; O'Hara, 167 Wn.2d at 98.

[5] O'Hara, 167 Wn.2d at 98 (quoting Kirkman, 159 Wn.2d at 926-27).

[6] Id.

[7] Id.

assess whether, if correct, it implicates a constitutional interest as compared to another form of trial error.[8]

If we determine that an error is constitutional, we next determine whether the error was manifest.[9] For purposes of RAP 2.5(a)(3), "manifest" requires a showing of actual prejudice.[1] To demonstrate actual prejudice, there must be a plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial of the case.[11] To ensure that the actual prejudice inquiry and the harmless error analysis are distinct, "the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review."[12]

Here, the alleged error is that a police detective testified during the State's case-in-chief that McClain requested to have counsel present during post-arrest questioning. Detective Larry Murray testified that he had advised McClain of his constitutional rights and McClain had waived those rights. Detective Murray then described questions that he and another detective asked McClain about what had happened at the apartment. Specifically, the prosecuting attorney questioned Detective Murray as follows:

Q: [State]: What else did he say at this point?

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[8] Id.

[9] Id. at 99.

[1] Id.

[11] Id.

[12] Id. at 99-100.

> A: [Detective Murray]: Mr. McClain at that point requested to speak to a family member and an attorney, he didn't want to talk anymore.
>
> Q: Alright, so you terminated the interview, correct?
>
> A: Yes.[13]

Detective Murray's response—that McClain requested to speak to an attorney during questioning—is a reference to the defendant's constitutional rights, whether or not the State sought to elicit this testimony from the witness. For purposes of our analysis, we assume without deciding that this is constitutional error.

We must next determine whether the constitutional error was manifest.[14] McClain must make a plausible showing that the error "had practical and identifiable consequences in the trial of the case."[15]

McClain argues that the detective's testimony prejudiced him because it "tended to cast doubt on the theory of diminished capacity." It was undisputed that McClain shot two victims and attempted to shoot a third. His defense at trial was that he was too intoxicated by "sherm," a form of PCP,[16] to have been capable of forming the requisite mental states for the crimes charged. But he

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[13] Report of Proceedings (November 19, 2008) at 127-28.

[14] O'Hara, 167 Wn.2d at 99.

[15] Id.

[16] "Sherm" is a street name for PCP and consists of a tobacco or marijuana cigarette dipped in formaldehyde or dissolved PCP.

points to no instance in the record showing that the State used his request for counsel to its advantage, either as evidence of guilt or to suggest that the request was evidence of his mental state. Outside of the detective's testimony, the jury heard no further reference to McClain's request for an attorney. There was no argument that any inference should be drawn from it. McClain has not established he was prejudiced by Detective Murray's testimony.

This conclusion is consistent with related case law. In State v. Sweet,[17] the jury heard a police officer's testimony that the officer asked the defendant if he would provide a written statement, and the defendant "said that he would do that after he had discussed the matter with his attorney."[18] No written statement was introduced at trial.[19] The court, recognizing the defendant's right to remain silent under the Fifth Amendment, concluded that the testimony was, "at best 'a mere reference to silence,'" which was "'not a "comment" on the silence'" and was not reversible error absent a showing of prejudice.[2] Similarly, here, the jury heard a reference to McClain's exercise of his constitutional rights, but the State did not comment on or otherwise seek to take advantage of this exercise.

In State v. Rogers,[21] the defendant was involved in an accident that killed

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[17] 138 Wn.2d 466, 980 P.2d 1223 (1999).

[18] Id. at 480.

[19] Id.

[2] Id. (quoting State v. Lewis, 130 Wn.2d 700, 706-07, 927 P.2d 235 (1996)).

[21] 70 Wn. App. 626, 855 P.2d 294 (1993).

the driver of the other vehicle.[22] After a police officer advised Rogers of his constitutional rights, Rogers answered all of the officer's questions until the officer asked him how much he had had to drink that evening.[23] The officer testified that at that point, Rogers replied, "'I would just as soon leave that.'"[24] The court held that even if the testimony was error, it did not rise to the constitutional proportions of RAP 2.5(a)(3).[25] The court noted that Rogers' refusal to say how much he had to drink was "not highlighted," but instead "quickly elicited and then passed over."[26] Additionally, "[t]he fact that defense counsel did not object to the question . . . or ask for a curative instruction suggests that it was of little moment in the trial."[27]

The same considerations discussed in Rogers apply here. Immediately after the challenged testimony, the State quickly moved on and made no other reference to the answer. McClain has not made a plausible showing that the asserted error had practical and identifiable consequences in his trial.[28]

This claimed error is not "manifest" for purposes of RAP 2.5(a), and we do

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[22] Id. at 628.

[23] Id. at 629.

[24] Id.

[25] Id. at 630-31.

[26] Id. at 631.

[27] Id.

[28] See O'Hara, 167 Wn.2d at 99.

not address it further.

PROSECUTORIAL MISCONDUCT

McClain argues that the State committed reversible misconduct by implying that he was involved in prostitution, an uncharged crime. Because he failed to object and the comment could have been cured by an instruction, we reject this argument.

Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect.[29] Reversal is not required if the error could have been obviated by a curative instruction that the defense did not request.[3]

Allegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.[31] Even if a prosecutor's remarks are improper, they are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts or statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.[32]

Finally, failure to object to an improper remark constitutes a waiver of

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[29] State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

[3] Id.

[31] Id. at 85-86.

[32] Id. at 86.

error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.[33] In other words, a conviction must be reversed only if there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict.[34]

Here, defense counsel did not object to the statements or request a curative instruction at trial. Thus, McClain must show on appeal that the State's remarks could not have been cured by an instruction to the jury.

McClain argues that the prosecuting attorney "suggested McClain's friend Liz was a prostitute and McClain was her pimp" during rebuttal closing argument. He contends that the argument was improper because it was not supported by the evidence and implied that he was guilty of an uncharged crime.

McClain correctly cites the principle that counsel, in closing arguments, may not make prejudicial statements that are not sustained by the record.[35] Courts have also found impropriety where the State has asked the jury to infer that the defendant is guilty of uncharged crimes.[36]

It was undisputed that McClain shot two victims and tried to shoot a third.

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[33] Id.

[34] Id.

[35] State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003).

[36] See State v. Torres, 16 Wn. App. 254, 256, 554 P.2d 1069 (1976) (prosecutor's reference to uncharged burglary in rape case was improper); State v. Henderson, 100 Wn. App. 794, 802-03, 998 P.2d 907 (2000) (improper for prosecutor to elicit testimony suggesting that defendant had injured someone in a fight that was not part of the facts underlying the charged robberies).

Among other things, defense counsel argued in closing argument that McClain "had no animosity," "no reason for animosity," and "no motive" for the shootings. The primary argument by the defense was that McClain did not have the mental capacity to form the requisite intent for any of the charged crimes because he was too high on sherm.

The State made the following remarks in its rebuttal closing argument:

> Counsel says, acquit Mr. McClain because he didn't know what he was doing.
>
> Let's for the sake of argument, assume for a minute, even though Dr. McClung says there is really no evidence of delusions and there is certainly no prominent evidence of delusions as required by the diagnostic criteria, let's assume there were some delusions and he really believed, for some stupid reason, completely irrational reason, that Liz was in danger, even though she wasn't.
>
> I would ask you, however, to consider who or what Liz might be because of drug decisions. Here is a woman, unfortunately because of the issues of drugs, is basically living on the street and or in a sleazy motel . . . . She goes to Mr. Howie's occasionally to wash up and to get high.
>
> Do you suppose, perhaps it's possible, that she might support her drugs or drug habit by prostitution? Do you suppose, perhaps, that Mr. McClain might have some involvement in that? Do you suppose that he might have been angry that, here's a woman who lives in a household with three people, drug addicts, who buys drugs from him and owes him, who have been, by now, spending more hours with Liz.
>
> He comes by, he can't find Liz. He thinks they are lying and he demands money. Keep in mind, also, that Tim Swenson was gone for a few hours looking for drugs, came back empty-handed. We don't know what happened to Tim. We don't know where Tim

went because Tim was murdered.

> But consider Mr. McClain, his lifestyle, his behavior, his history, and it's not a stretch of any imagination to believe that he had a clear motive for killing one and all of the occupants of Number 206.[37]

Assuming without deciding that some portion of the State's remarks was improper, McClain did not object and request a curative instruction. The State's remarks were not so flagrant and ill-intentioned that they could not have been cured with a prompt admonition to the jury.[38] The error was not preserved for appeal. We do not address further the claim of misconduct.

DNA COLLECTION FEE

McClain argues that the trial court erred in failing to exercise discretion as to the DNA collection fee because the fee was not mandatory at the time he committed his offense. In the alternative, he argues that application of the amended DNA collection fee statute, which makes the fee mandatory but did not become effective until after the time of his offenses, would violate the prohibition on ex post facto laws. Finally, McClain argues that his trial counsel was ineffective for failing to object to the imposition of the DNA collection fee because it was not mandatory under controlling law. We disagree with McClain on each of these points.

In 2002, the legislature enacted a statute requiring courts to impose a $100 DNA collection fee with every sentence imposed under chapter 9.94A

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[37] Report of Proceedings (December 3, 2008) (p.m.) at 82-84.

[38] See Russell, 125 Wn.2d at 86.

RCW for certain specified crimes, "unless the court finds that imposing the fee would result in undue hardship on the offender."[39] In 2008, the legislature passed an amendment to make the fee mandatory regardless of hardship.[4] The amendment took effect June 12, 2008.[41]

McClain committed his offenses on February 21, 2005, and was sentenced on January 9, 2009. Accordingly, the DNA collection fee was not mandatory at the time McClain committed his offenses but was mandatory at the time he was sentenced.

This court has addressed the same facts and arguments in two recent cases: State v. Brewster[42] and State v. Thompson.[43] The defendants in both cases, like McClain, committed their offenses before the 2008 amendment went into effect.

In Brewster, the defendant argued that the saving statute, RCW 10.01.040, barred the application of the new statute to her.[44] Under the saving statute, criminal cases generally must be prosecuted and decided according to the law in effect at the time of the offense.[45] But we held that Brewster was

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[39] Former RCW 43.43.7541 (2002); State v. Thompson, 153 Wn. App. 325, ¶ 31, __ P.3d __ (2009) (quoting former RCW 43.43.7541 (2002)).

[4] RCW 43.43.7541; Thompson, 153 Wn. App. 325, ¶ 32.

[41] Laws of 2008, ch. 97, § 3; Thompson, 153 Wn. App. 325, ¶ 33.

[42] 152 Wn. App. 856, 218 P.3d 249 (2009).

[43] 153 Wn. App. 325, __ P.3d __ (2009).

[44] Brewster, 152 Wn. App. at 859.

subject to the version of the statute in effect at the time of her sentencing because the DNA collection fee is not punitive and the saving statute applies only to criminal and penal statutes.[46]

In Thompson, we additionally held that the state and federal constitutional prohibitions against ex post facto laws are not a basis for avoiding the application of the 2008 statutory amendment.[47] Again, this was because the ex post facto clauses of the federal and state constitutions apply only to punitive laws and the DNA fee is not punitive.[48]

Under our holdings in Brewster and Thompson, McClain was subject to the version of the DNA collection fee statute in effect at the time of his sentencing. That version made the fee mandatory. The trial court did not err in this respect. Nor was the performance of McClain's counsel deficient in failing to urge application of the previous version.[49]

CrR 3.5 WRITTEN FINDINGS

McClain seeks remand of his case for entry of written findings of fact and conclusions of law relating to the admissibility of his statements to police, as required by CrR 3.5(c). The findings and conclusions were filed after McClain

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[45] Id. (quoting RCW 10.01.040).

[46] Id. at 859, 861.

[47] Thompson, 153 Wn. App. 325, ¶ 36.

[48] Id.

[49] See Brewster, 152 Wn. App. at 861.

filed his opening brief on appeal.[5] Accordingly, we will not reverse on these grounds unless McClain can establish that he was prejudiced by the delay or that the findings and conclusions were tailored to meet the issues presented in his brief.[51] Because McClain filed no reply brief challenging the findings and conclusions, remand is unnecessary.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Appelwick, J.

Grosse, J.

[5] We note that the trial court actually signed the written findings and conclusions on June 20, 2009, which was before McClain filed his opening brief. Neither party has offered an explanation for the significant delay between the time of signing and filing.

[51] State v. Quincy, 122 Wn. App. 395, 398, 95 P.3d 353 (2004) (citing State v. Byrd, 83 Wn. App. 509, 512, 922 P.2d 168 (1996)).